

Susan B. Montgomery (AZ Bar # 020595)
MONTGOMERY & INTERPRETER, PLC
3301 E. Thunderbird Rd.
Phoenix, AZ 85032
(480) 513-6825
smontgomery@milawaz.com

Roger Flynn (Pro Hac Vice Application To Be Filed)(CO Bar # 21078)
WESTERN MINING ACTION PROJECT
P.O. Box 349; 440 Main Street, #2
Lyons, CO 80540
(303) 823-5738
roger@wmaplaw.org

Allison N. Henderson (Pro Hac Vice Application To Be Filed)(CO Bar # 45088)
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 3024
Crested Butte, Colorado 81224
(970) 309-2008
ahenderson@biologicaldiversity.org

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Mining Reform Coalition;
Center for Biological Diversity;
Earthworks; Concerned Citizens and
Retired Miners Coalition; and Grand
Canyon Chapter of the Sierra Club,

Plaintiffs,

v.

Martha Guzman, in her official
capacity as Regional Administrator
Environmental Protection Agency
Region 9; United States
Environmental Protection Agency;
Michael Regan, in his official
capacity as Administrator of the
Environmental Protection Agency,

Defendants.

Case No. _____

**COMPLAINT for
DECLARATORY, EQUITABLE,
AND INJUNCTIVE RELIEF**

Pursuant to the Clean Water Act

SUMMARY OF THE CASE AND FACTUAL BACKGROUND

1
2 1. Through this action, Plaintiffs Arizona Mining Reform Coalition (“AMRC”),
3 Center for Biological Diversity (the “Center”), Earthworks, the Concerned Citizens and
4 Retired Miners Coalition (“CCRM”), and the Grand Canyon Chapter of the Sierra Club
5 (“Sierra Club”), challenge the failure of Defendant Regional Administrator of the United
6 States Environmental Protection Agency (“EPA”), and the EPA, to ensure the protection and
7 restoration of Queen Creek, a valuable desert stream near Superior, Arizona in violation of
8 the mandates of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1251, *et seq.*

9 2. More specifically, the Regional Administrator of EPA Region 9 (with
10 jurisdiction and authority over implementation of the CWA in Arizona), Martha Guzman,
11 has failed to establish and promulgate a Total Maximum Daily Load (“TMDL”), for copper
12 and lead in Queen Creek, a nondiscretionary duty under the CWA that EPA has failed to
13 meet. 33 U.S.C. § 1313(d).

14 3. Queen Creek will be on the receiving end of discharges from the copper
15 mining project proposed by Resolution Copper Co. (corporate name for the joint Rio Tinto
16 and BHP Copper “Resolution Copper Project”). This massive copper mining project will
17 discharge significant amounts of copper and other pollutants into Queen Creek. This is in
18 addition to other current discharges of pollutants from other sources into Queen Creek.

19 4. The State of Arizona, under section 303(d) of the CWA, is required to identify
20 its polluted waters that are not meeting applicable water quality standards for pollutants
21 (known as impaired waters), and establish a Total Maximum Daily Load (“TMDL”) for each
22 pollutant in the water body. A TMDL analysis must then be completed to establish baseline
23 measurements of pollutant materials in those water bodies and to identify potential
24 reductions needed to attain standards.

25 5. Queen Creek Reach No. 15050100-014A, (headwaters to the Superior
26 Wastewater Treatment Plant discharge), has been listed on Arizona’s 303(d) list as impaired
27 for dissolved copper since 2002. Reach No. 15050100-014B, (Superior Wastewater
28 Treatment Plant discharge to Potts Canyon) has been listed as impaired for dissolved copper

1 since 2004. Reach No. 15050100-014C (Potts Canyon confluence to the Whitlow Dam) has
2 been listed as impaired for dissolved copper since 2010. *See* Arizona’s 303(d) List of
3 Impaired Waters. *See* Arizona Dep’t of Env’tl. Quality, Arizona’s 2022 Clean Water Act
4 Assessment (July 1, 2012 to June 30, 2021) Integrated 305(b) Assessment and 303(d) Listing
5 Report (revised Dec. 2021) (Arizona’s current (2022) 303(d) List of Impaired Waters)
6 https://static.azdeq.gov/pn/pn_draft2022cwaa.pdf;
7 [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fstatic.azdeq.gov%2F](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fstatic.azdeq.gov%2Fwqd%2Fwqa%2F2022_cwaa_app.xlsx&wdOrigin=BROWSELINK)
8 [wqd%2Fwqa%2F2022_cwaa_app.xlsx&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fstatic.azdeq.gov%2Fwqd%2Fwqa%2F2022_cwaa_app.xlsx&wdOrigin=BROWSELINK) (appendices to
9 Assessment Report, listing Queen Creek as a Priority 5 Impaired Water).

10 6. EPA recently approved ADEQ’s proposed 303(d) list (with objections for
11 waters not relevant here). *See* June 16, 2022 letter from Tomás Torres, Director, EPA Region
12 9 Water Division, to Trevor Baggione, Director, ADEQ Water Quality Division. As EPA
13 stated to ADEQ, for Priority 5 Waters such as Queen Creek: “Available data and/or
14 information indicate that at least one designated use is not being support[ed] or is threatened,
15 and a TMDL is needed.” EPA Torres letter, at 2.

16 7. Yet, for years, neither EPA nor ADEQ took actions to promulgate the TMDL
17 for Queen Creek. And this continues to be the case, despite EPA’s statement that “a TMDL
18 is needed” for a Priority 5 Water such as Queen Creek.

19 8. ADEQ obtained primacy to administer CWA Section 402 discharge permits
20 (“NPDES permits”) under the Clean Water Act in 2002. Env’tl. Prot. Agency, NPDES State
21 Program Authority (Sept. 20. 2023) [https://www.epa.gov/npdes/npdes-state-program-](https://www.epa.gov/npdes/npdes-state-program-authority)
22 [authority](https://www.epa.gov/npdes/npdes-state-program-authority). In doing so, ADEQ agreed, among other things, that it would “[d]evelop and
23 maintain, to the maximum extent possible, the legal authority and the resources required to
24 carry out all aspects of the AZPDES program” and [m]aintain a vigorous program of taking
25 timely and appropriate enforcement action” under the CWA. *See* National Pollutant
26 Discharge Elimination System Memorandum of Agreement Between the State of Arizona
27 and the United States Environmental Protection Agency Region 9 (Dec. 5, 2002)

1 <https://www.epa.gov/sites/default/files/2013-08/documents/az-moa-npdes.pdf> (“NPDES
2 MOA between State of Arizona and U.S. EPA Region 9”).

3 9. ADEQ’s longstanding failure to complete a TMDL for Queen Creek, while
4 simultaneously renewing or reissuing NPDES permits (known in Arizona as “AZPDES
5 permits”) that will allow continued waste loading and pollutant discharges into Queen Creek,
6 fails to meet ADEQ’s obligations under the law and the commitment it gave to EPA when it
7 secured primacy under Section 402 of the CWA.

8 10. In fact, ADEQ’s failings in administering its obligations under the CWA was
9 recently noted by the Arizona Auditor General, who observed ADEQ “has not ... reduced
10 the number of impaired surface waters in the State, limiting its ability to keep these waters
11 safe from pollution.” Ariz. Auditor General, Ariz. Dep’t of Env’tl. Quality, Water Quality
12 Protection Responsibilities, Performance Audit Report No. 21-116 (Sept. 28, 2021)
13 [https://www.azauditor.gov/reports-publications/state-agencies/environmental-quality-](https://www.azauditor.gov/reports-publications/state-agencies/environmental-quality-department/report/arizona-department-4)
14 [department/report/arizona-department-4](https://www.azauditor.gov/reports-publications/state-agencies/environmental-quality-department/report/arizona-department-4).

15 11. EPA and ADEQ have long known that Queen Creek does not meet the water
16 quality standards for copper, and that because of this pollution, beneficial uses of the stream
17 are not being protected. Recognizing this, in 2017, ADEQ issued a Draft TMDL for Queen
18 Creek, stating that: “The Arizona Department of Environmental Quality (ADEQ), in
19 accordance with Section 303(d) of the Clean Water Act, has developed a Total Maximum
20 Daily Load (TMDL) analysis for three reaches of Queen Creek located near Superior, Ariz.
21 TMDL’s have also been developed for Arnett Creek and two unnamed drainages. ADEQ
22 has determined through sample collection and data analysis that the six separate stream
23 reaches are impaired for dissolved copper.” Ariz. Dep’t Env’tl. Quality, Public Notice No. 17-
24 10 (Sept. 27, 2017) [https://www.azdeq.gov/notices/comment-period-begins-extended-tmdl-](https://www.azdeq.gov/notices/comment-period-begins-extended-tmdl-analysis-three-reaches-queen-creek-arnett-creek-and-two)
25 [analysis-three-reaches-queen-creek-arnett-creek-and-two](https://www.azdeq.gov/notices/comment-period-begins-extended-tmdl-analysis-three-reaches-queen-creek-arnett-creek-and-two); Ariz. Dep’t Env’tl. Quality, Queen
26 Creek, Arnett Creek, Unnamed Drainages Total Maximum Daily Loads (TMDL) for
27 Dissolved Copper (Sept. 18, 2017) (“Draft TMDL”)
28 https://static.azdeq.gov/pn/draft_tmdl_queen_arnett.pdf.

1 12. ADEQ further noted the need to promulgate a TMDL for Queen Creek: “The
2 objective of the federal Clean Water Act is to restore and maintain the chemical, physical,
3 and biological integrity of the nation's waters. To fulfill this objective, states assess their
4 surface waters and identify which waters do not meet state surface water quality standards.
5 A TMDL must be completed for each pollutant ‘impairing’ (or not meeting surface water
6 quality standards) these waterbodies.” Ariz. Dep’t Env’tl. Quality, Fact Sheet Queen Creek
7 Total Maximum Daily Load, Publication No. FS 05-11.

8 13. Instead of promulgating a TMDL for Queen Creek, ADEQ renewed an
9 AZPDES discharge permit to Resolution Copper for discharges into Queen Creek from the
10 proposed Resolution Copper Project, without the benefit and protections afforded by a
11 TMDL. (Permit No. AZ0020389). The AZPDES permit allows discharges of mine site
12 stormwater from Outfall 001 and discharges of treated mine project water from Outfall 002
13 (as of 2010) to an unnamed wash, tributary to Queen Creek, located upstream of Boyce
14 Thompson Arboretum and the local community of Queen Valley.

15 14. Without any plan to remediate the impairments to Queen Creek, and without
16 taking any action since 2017 to complete a TMDL, ADEQ renewed its AZPDES permit for
17 Resolution. That permit renewal was recently vacated by the Arizona appeals court in a
18 case filed by the San Carlos Apache Tribe. *See San Carlos Apache Tribe v. State*, 520 P.3d
19 670 (Ariz. Ct. App. Nov. 15, 2022). The Arizona Supreme Court is currently reviewing the
20 appeals court decision.

21 15. Prior to that decision, ADEQ proposed to renew the permit again.

22 16. ADEQ made an initial attempt to initiate completion of a TMDL, but ADEQ
23 abruptly stopped work on the TMDL by 2018.

24 17. In September 2018, after nine months of silence following the close of the
25 2017 Draft TMDL public comment period, ADEQ notified the public that it had stopped
26 work on the Draft TMDL, saying in a public e-mail with the subject: “Queen Creek TMDL
27 Update: Project on Hold.” E-mail from ADEQ, to Roger Featherstone, AMRC, “Queen
28 Creek TMDL Update: Project on Hold” (Sept. 27, 2018).

1 18. In April 2022, a public records request with ADEQ was filed, seeking updated
2 documents and materials on the status of this long-overdue Queen Creek TMDL. In May
3 2022, the ADEQ Records Division responded, stating that “[t]here has been no movement on
4 completing the Queen Creek TMDL,” therefore ADEQ “didn’t expect to find any more
5 recent documentation” than the September 2017 Queen Creek TMDL draft.

6 19. Instead of establishing the TMDL in conformance with the Clean Water Act,
7 ADEQ has instead simply chosen to forego this mandatory requirement. ADEQ has not,
8 however, decided to forego renewal of the AZPDES permit to Resolution Copper, which will
9 result in unlawful copper loading to Queen Creek.

10 20. ADEQ, and EPA’s, failure to promulgate the required TMDL compounds the
11 over 20-year failure of ADEQ and EPA to address the ongoing water quality violations and
12 impairment of Queen Creek. The following timeline highlights the agencies’ failures.

13 21. 2002: Dissolved copper loading found to be exceeding surface water quality in
14 Queen Creek (upper reach). Ariz. Dep’t Env’tl. Quality, Arizona’s 2018 303(d) List
15 [https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list-](https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list-2018.pdf)
16 [2018.pdf](https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list-2018.pdf).

17 22. 2002: ADEQ reportedly began work on Queen Creek TMDL. Draft TMDL, p.
18 1, ¶ 2.

19 23. 2004: Dissolved copper loading found to be exceeding surface water quality in
20 Queen Creek (middle reach). Ariz. Dep’t Env’tl. Quality, Arizona’s 2018 303(d) List
21 [https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list-](https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list-2018.pdf)
22 [2018.pdf](https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list-2018.pdf).

23 24. 2005: ADEQ (potentially) submits grant proposal to EPA for federal funding
24 to complete Queen Creek TMDL (est. completion 2007). *See* ADEQ Grant Proposal dated
25 2005.

26 25. Dissolved copper found to be exceeding surface water quality in Queen Creek
27 (lower reach). Ariz. Dep’t Env’tl. Quality, Arizona’s 2018 303(d) List
28

1 <https://www.resolutionmineeis.us/sites/default/files/references/adeq-impaired-waters-list->
2 2018.pdf.

3 26. Feb. 2010: ADEQ Publishes Interim Queen Creek TMDL Modeling Report.

4 27. Jul. 2010: ADEQ e-mail to attorneys for the Inter Tribal Association of
5 Arizona (“ITAA”): “Although we are nearing the end of the project, we still have a few loose
6 ends to account for. The sampling has shown some hot spots with elevated levels of lead and
7 copper. We are currently attempting to see if we can verify the numbers and assign a
8 possible source.” (Excerpt). E-mail from Kyle Palmer, ADEQ to Montgomery & Interpreter,
9 PLC, “TMDL study for Queen Creek” (July 8, 2010).

10 28. 2013: Queen Creek TMDL Modeling Report completed for ADEQ by The
11 Louis Berger Group (contracted consultant). *See* Ariz. Dep’t Env’tl. Quality, Queen Creek
12 TMDL Modeling Report (Jan. 2013)

13 https://static.azdeq.gov/pn/tmdl_modeling_queen_arnett.pdf.

14 29. Sept. 2017: ADEQ publishes Modeling Report and Draft TMDL for Three
15 Reaches of Queen Creek, Arnett Creek and Two Unnamed Drainages. Public comments
16 closed Dec. 2017.

17 30. Sept. 2018: ADEQ sends the following e-mail: “Greetings Interested Parties,
18 Thank you for your interest in the Queen Creek TMDL project. Following two public
19 meetings held by ADEQ to discuss the draft report, written feedback was gathered which
20 revealed technical issues needing to be addressed. In order to best achieve our mission to
21 protect public health and the environment of Arizona, ADEQ is suspending normal project
22 activities until these issues can be completely resolved. Once resolved, we will provide an
23 update and the TMDL project can move forward.” E-mail from ADEQ to Roger
24 Featherstone, AMRC, “Queen Creek TMDL Update: Project on Hold” (Sept. 27, 2018).

25 31. April 2021 (approx.): EPA sends what is referred to by ADEQ as a PPG
26 Warning Letter inquiring what work ADEQ has done in lieu of the Queen Creek TMDL.

27 32. April 2022: ADEQ proposes to renew the Queen Creek AZPDES discharge
28 permit to Resolution.

33. May 2022: In response to a Public Records Request for updated TMDL materials, ADEQ states: “Per the programs, the TMDL document they have for Queen Creek is dated September 18, 2017. Since there has been no movement on completing the Queen Creek TMDL, They didn’t expect to find any more recent documentation. The TMDL is officially on pause until it is reestablished by the TMDL program.” E-mail from Jesus Barreras, ADEQ to Alexandra Corcoran, Montgomery & Interpreter, PLC (May 17, 2022).

34. June 2022: EPA approves ADEQ 303(d) list, recognizing ADEQ’s ranking of Queen Creek as a “low” or “medium” priority for issuing a TMDL, but with no plans for development of the TMDL.

35. Thus, for at least 20 years, EPA has been aware of ADEQ’s failure to prepare the required TMDL for Queen Creek, yet EPA has taken no substantive action to prepare a TMDL, or require ADEQ to prepare one.

36. In doing so, EPA has violated its mandatory duty under CWA section 303(d), 33 U.S.C. § 1313(d)(2), to develop a TMDL for Queen Creek.

JURISDICTION AND VENUE

37. The Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and 33 U.S.C. § 1365(a)(2) (Clean Water Act). The relief requested herein is authorized by 33 U.S.C. § 1365(a).

38. In accordance with the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A), Plaintiffs notified Regional Administrator of the EPA in San Francisco, Defendant Martha Guzman, and EPA headquarters in Washington, D.C., of its violations of the CWA and of Plaintiffs’ intent to sue under the CWA by letter dated, mailed and postmarked, and e-mailed, August 9, 2022 (“Notice Letter”). At the time of the filing of this Complaint, more than sixty (60) days have passed since the Notice Letter was issued.

39. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in this District as Queen Creek is located in Arizona. Plaintiffs AMRC, Concerned Citizens and

1 Retired Miners Coalition, and the Grand Canyon Chapter of the Sierra Club have their
2 offices in Arizona.

3 **PARTIES**

4 40. The Plaintiffs in this action are the parties that submitted the 60-day notice to
5 Regional Administrator Guzman and EPA.

6 41. **Arizona Mining Reform Coalition** works in Arizona to improve state and
7 federal laws, rules, and regulations governing hard rock mining to protect communities and
8 the environment. AMRC works to hold mining operations to the highest environmental and
9 social standards to provide for the long term environmental, cultural, and economic health
10 of Arizona. Members of the Coalition include: the Center for Biological Diversity,
11 Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona,
12 Courtland Ghost Town, Dragoon Conservation Alliance, Earthworks, Environment Arizona,
13 Groundwater Awareness League, Maricopa Audubon Society, Save the Scenic Santa Ritas,
14 Grand Canyon Chapter of the Sierra Club, Sky Island Alliance, Tucson Audubon Society,
15 Arizona Trail Association, and the Valley Unitarian Universalist Congregation.

16 42. The **Concerned Citizens and Retired Miners Coalition** is a group of
17 citizens who: 1) reside in Superior, Arizona, or do not reside in Superior, Arizona, but are
18 affiliated with relatives who are residents; or 2) are retired hard-rock miners who previously
19 worked in the now non-operational mine in Superior, Arizona, and were displaced due to
20 mine closure or personal disability; and 3) are individuals who are concerned about
21 protecting Queen Creek and surrounding lands and waters, especially from the
22 environmental impacts caused by the proposed Resolution Copper Mine.

23 43. **Earthworks** is a nonprofit organization dedicated to protecting communities
24 and the environment from the adverse impacts of mineral and energy development while
25 promoting sustainable solutions. Earthworks stands for clean air, water and land, healthy
26 communities, and corporate accountability. We work for solutions that protect both the
27 Earth's resources and our communities.

28

1 44. **The Center for Biological Diversity** is a non-profit public interest
2 organization with headquarters located in Tucson, Arizona, representing more than 84,000
3 members nationwide dedicated to the conservation and recovery of threatened and
4 endangered species and their habitats. The Center has long-standing interest in projects of
5 ecological significance undertaken in the National Forests of the Southwest, including
6 mining projects.

7 45. **Sierra Club** is one of the nation's oldest and most influential grassroots
8 organizations whose mission is "to explore, enjoy, and protect the wild places of the earth;
9 to practice and promote the responsible use of the earth's ecosystems and resources; and to
10 educate and enlist humanity to protect and restore the quality of the natural and human
11 environments." Sierra Club has more than 3.7 million members and supporters with more
12 than 12,000 members in Arizona as part of the Grand Canyon (Arizona) Chapter. Our
13 members have long been committed to protecting and enjoying the Tonto National Forest,
14 Arizona waters, and have a significant interest in the proposed Resolution Copper Mine and
15 related activities.

16 46. Plaintiffs' members regularly use and enjoy the waters and adjacent lands in
17 and along Queen Creek that have been designated as impaired by ADEQ's 303(d) list.
18 Plaintiffs' members have definite future plans to continue using them for recreational,
19 scientific, aesthetic, spiritual, conservation, educational, employment, and other purposes,
20 including wading, picnicking, and watching and enjoying wildlife in and along the Creek.
21 The use and enjoyment that Plaintiffs' members derive from using the waters of Queen
22 Creek is diminished by the effects of pollution, including the copper and other pollutants that
23 exist, and would be added by Resolution Copper's discharges into Queen Creek and the
24 failure of EPA to establish a TMDL for Queen Creek. Plaintiffs' members would derive
25 more benefits and enjoyment from their use of these waters if these pollutants were not
26 adversely affecting water quality and aquatic and aquatic-dependent species in these waters.

27

28

1 53. CWA section 303(d)(2) requires states to “submit to the Administrator from
2 time to time” a list of “waters identified and loads established under” subsections
3 303(d)(1)(A)-(D), including, among other components, a list of waters for which technology-
4 based effluent limitations “are not stringent enough to implement any water quality standard
5 applicable to such waters.” 33 U.S.C. § 1313(d)(2); *see also* 40 C.F.R. §§ 130.7(b);
6 130.10(b), (d).

7 54. Such waters are called “water quality limited” or “impaired” waters. 40 C.F.R.
8 § 131.3(h) (“Water quality limited segment means any segment where it is known that water
9 quality does not meet applicable water quality standards, and/or is not expected to meet
10 applicable water quality standards.”)

11 55. EPA has promulgated rules that establish the frequency of such submissions,
12 consistent with the statute. Every two years states must compile their list of impaired waters
13 and submit them to EPA for approval. 33 U.S.C. § 1313(d)(1)(A), (d)(2). These lists are
14 commonly called “303(d) lists” in reference to section 303(d) of the CWA, 33 U.S.C. §
15 1313(d).

16 56. The 303(d) lists serve several important functions, in addition to identifying
17 which waterbodies must receive the required TMDL clean-up plans. The list provides the
18 public and local governments with specific information about the health of the waterbodies
19 throughout the state and identifies which waterbodies may not be safe to use. The list
20 identifies where improved nonpoint source controls of polluted runoff from land activities,
21 such as farming and logging, are needed, as well as priorities for habitat restoration. Finally,
22 when a waterbody is listed as water quality-limited/impaired, additional protections are
23 triggered under the CWA’s NPDES permitting requirements to ensure impaired waters are
24 not further degraded. *See* 40 C.F.R. §§ 122.4, 122.44. *See also* Friends of Pinto Creek v. U.S.
25 E.P.A., 504 F.3d 1007, 1013 (9th Cir. 2007).

26 57. For purposes of listing impaired waters, the applicable water quality standards
27 include waters’ designated uses, numeric criteria, narrative criteria, and antidegradation
28 requirements. 40 C.F.R. § 130.7(b)(3).

1 58. In order to identify water quality-limited segments, each state, at a minimum,
2 must “assemble and evaluate all existing and readily available water quality-related data and
3 information” for certain categories of waters that include, but are not limited to, “those for
4 which water quality problems have been reported by local, state, or federal agencies;
5 members of the public; or academic institutions.” 40 C.F.R. § 130.7(b)(5), (b)(5)(iii).

6 59. “The Regional Administrator shall approve a list developed under § 130.7(b) .
7 . . . only if it meets the requirements of § 130.7(b).” 40 C.F.R § 130.7(d)(2).

8 60. A state must submit an updated impaired waters list to EPA on April 1 of
9 every even-numbered year. 40 C.F.R. § 130.7(d)(1). States submit these lists to EPA for
10 approval or disapproval. 33 U.S.C. § 1313(d)(2). EPA must act on the list within 30 days; if
11 it disapproves the list, EPA must establish a replacement list within 30 days of the
12 disapproval. 33 U.S.C. § 1313(d)(2).

13 61. For each of their 303(d)-listed impaired waters, states must establish a “total
14 maximum daily load” (“TMDL”) of pollutants “at a level necessary to implement the
15 applicable water quality standards[.]” 33 U.S.C. § 1313(d)(1)(C). To encourage prompt state
16 action even where water quality data are imperfect, the CWA requires that TMDLs include a
17 “margin of safety which takes into account any lack of knowledge concerning the
18 relationship between effluent limitations and water quality.” *Id.*

19 62. States are required to “establish a priority ranking” for their 303(d)-listed
20 impaired waters, “taking into account the severity of the pollution and the uses to be made of
21 such waters.” 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(4). States “shall establish”
22 TMDLs “in accordance with the priority ranking.” 33 U.S.C. § 1313(d)(1)(C). “Schedules
23 for submission of TMDLs shall be determined by the Regional Administrator and the State.”
24 40 C.F.R. § 130.7(d)(1).

25 63. A TMDL is the total daily loading of a pollutant for a particular waterbody or
26 segment. *See* 40 C.F.R. § 130.2(i). The total amount of a pollutant that may enter a
27 waterbody while ensuring the waterbody is still meeting water quality standards is called its
28 “loading capacity.” 40 C.F.R. § 130.2(f).

64. After calculating a waterbody's loading capacity, a TMDL then distributes portions of the total loading capacity to individual sources or categories of pollution sources, like dividing up a pie. These allocations include both "load allocations" for nonpoint sources and "wasteload allocations" for point sources of pollution. 40 C.F.R. § 130.2(i). The purpose of load and wasteload allocations is to allocate the total amount of pollution that may enter a waterbody between all the sources of pollution, including both point and nonpoint sources, thereby restricting pollution inputs sufficiently to attain and maintain water quality standards. 40 C.F.R. § 130.7(c).

65. A TMDL is the CWA mechanism designed to ensure that assumptions about nonpoint source load reductions that "make more stringent load allocations practicable, then wasteload allocations can be made less stringent." 40 C.F.R. § 130.2(i). In this way, "the TMDL process provides for nonpoint source control tradeoffs." *Id.* Without "reasonable assurance" that nonpoint source controls will be implemented, TMDLs must require maximum pollution controls from NPDES permitted sources.

66. As with water quality standards and impaired waters lists, states must submit TMDLs to EPA for approval or disapproval. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.2(d). EPA must act on the TMDL submission within 30 days, and if it disapproves the TMDL, EPA must establish a replacement TMDL within 30 days of the disapproval. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2) ("If the Regional Administrator disapproves such listings and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable [water quality standards].").

67. Subsequent to EPA approval of TMDLs, the permitting authority for a state must ensure that "[e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocations for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7." 40 C.F.R. § 122.44(d)(1)(vii)(B). The approved load allocations serve as the basis for state and local programs for controlling

1 nonpoint source pollution, including state programs that receive federal funds under CWA
 2 section 319, 33 U.S.C. § 1329. Once EPA approves a TMDL, the state must also incorporate
 3 the TMDL into its “continuing planning process” under CWA section 303(e), 33 U.S.C. §
 4 1313(e)(3)(C).

5 68. Section 303(d) of the CWA “expressly requires the EPA to step into the
 6 states’ shoes if their TMDL submissions . . . are inadequate.” Alaska Center for the Env’t. v.
 7 Reilly, 762 F. Supp. 1422, 1429 (W.D. Wa. 1993). Further, because “Congress prescribed
 8 early deadlines for the TMDL process,” appropriate TMDL schedules must be counted in
 9 “months and a few years, not decades.” Idaho Sportsmen’s Coalition v. Browner, 951 F.
 10 Supp. 962, 967 (W.D. Wa. 1996).

11 69. Congress intended for TMDLs to be developed promptly, without undue
 12 delay. 33 U.S.C. § 1313(d).

13 70. EPA’s obligation to review and either approve or disapprove a state-
 14 submitted TMDL is a non-discretionary duty. *See San Francisco BayKeeper v. Whitman*,
 15 297 F.3d 877, 880 (9th Cir. 2002), and the district courts have jurisdiction to “order the
 16 Administrator to perform such act or duty” under the CWA’s citizen suit provision, 33
 17 U.S.C. § 1365(a)(2).

18 71. Arizona’s TMDL statutes (A.R.S. § 49-231 *et seq.*) require that 303(d)-listed
 19 impaired waters be developed within at least 15 years: “Total maximum daily loads that are
 20 required to be developed for WOTUS that are included for the first time on subsequent lists
 21 shall be developed within fifteen years of the initial inclusion of the water on the list.” A.R.S.
 22 § 49-233(B).

23 72. This has not occurred for Queen Creek.

24 73. According to ADEQ: Category 5 waters are defined as those: “Not supporting
 25 for one or more designated uses by a pollutant, and a TMDL needs to be developed or
 26 revised: Assessment units with at least one designated use classified as not supporting and a
 27 Total Maximum Daily Load analysis needs to be completed. The assessment unit remains in
 28 Category 5 until EPA has approved the TMDL or the pollutant is otherwise delisted. Only

category 5 waters are placed on the 303(d) impaired water's list (Appendix C)." Arizona Dep't of Env'tl. Quality, Arizona's 2022 Clean Water Act Assessment (July 1, 2012 to June 30, 2021) Integrated 305(b) Assessment and 303(d) Listing Report (revised Dec. 2021), Chapter 3-20, (Arizona's current (2022) 303(d) List of Impaired Waters) https://static.azdeq.gov/pn/pn_draft2022cwaa.pdf.

74. Queen Creek is listed as impaired (Category 5) in Appendix C of ADEQ's current 303(d) List. https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fstatic.azdeq.gov%2Fwqd%2Fwqa%2F2022_cwaa_app.xlsx&wdOrigin=BROWSELINK.

75. "Where a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act." Columbia Riverkeeper v. Wheeler, 944 F.3d 1204, 1211 (9th Cir. 2019).

76. "We reaffirmed this principle in *City of Arcadia v. U.S. Environmental Protection Agency*, holding that '[t]he EPA is also under a mandatory duty to establish a TMDL when a State fails over a long period of time to submit a TMDL; this prolonged failure can amount to the constructive submission of an inadequate TMDL, thus triggering the EPA's duty to issue its own.'" 411 F.3d 1103, 1105 (9th Cir. 2005)(internal quotation marks omitted)." Columbia Riverkeeper, at 1208

77. "This constructive submission of no TMDL triggers the EPA's duty to develop and issue its own TMDL within 30 days, and it has failed to do so. The time has come—the EPA must do so now." Columbia Riverkeeper, at 12011-12.

78. This is the situation at Queen Creek, as ADEQ has failed to promulgate the Queen Creek TMDL, since at least 2017, and indeed since Queen Creek has been on the 303(d) list since 2002.

79. To date, EPA has taken no substantive action to prepare a TMDL for Queen Creek.

1 80. EPA currently has no plans to prepare a TMDL for Queen Creek.

2 81. Under the “constructive submission doctrine,” EPA has a “mandatory duty to
3 act,” and its failure to prepare a TMDL for Queen Creek violates the CWA.

4 **Judicial Review under the Clean Water Act’s Citizen Suit Provision**

5 82. The CWA authorizes citizen suits against the EPA Administrator “where there
6 is alleged a failure of the Administrator to perform any act or duty under this chapter which
7 is not discretionary with the Administrator.” 33 U.S.C. § 1365(a)(2).

8 83. The district courts have jurisdiction over suits against the Administrator
9 arising under the citizen suit provision and may “order the Administrator to perform such act
10 or duty” the non-performance of which is the basis for the claim. 33 U.S.C. § 1365(a).

11
12 **FIRST CAUSE OF ACTION**

13 84. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

14 85. Under the “constructive submission doctrine,” the CWA, and its implementing
15 regulations, EPA has a mandatory duty to act to prepare a TMDL for Queen Creek, which
16 EPA has failed to do.

17 86. EPA’s failure to promulgate a proper TMDL for Queen Creek violates the
18 CWA and its implementing regulations.

19 87. Based on EPA’s failures, this Court should “order the Administrator [EPA] to
20 perform such act or duty.” 33 U.S.C. § 1365(a). This duty includes the prompt preparation
21 and issuance of a legally-compliant TMDL for Queen Creek.

22
23 **REQUEST FOR RELIEF**

24 For the foregoing reasons, Plaintiffs respectfully request that this Court:

25 A. Declare that the EPA has violated the Clean Water Act, and the implementing
26 regulations and policies, by failing to prepare a legally-compliant TMDL due to ADEQ’s
27 constructive submission of no TMDL;

28 B. Order EPA to promptly issue a lawful TMDL for Queen Creek;

1 C. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including
2 attorneys' fees under the Clean Water Act, 33 U.S.C. § 3615(d); and

3 D. Grant such additional relief as this court deems equitable, just, and proper.
4

5 Respectfully submitted this 27th day of September, 2023,

6 /s/ Susan Montgomery

7 Susan B. Montgomery (AZ Bar # 020595)
8 MONTGOMERY & INTERPRETER, PLC
9 3301 E. Thunderbird Rd.
10 Phoenix, AZ 85032
(480) 513-6825
smontgomery@milawaz.com

11 /s/ Roger Flynn

12 Roger Flynn (Pro Hac Vice Application To Be Filed)(CO Bar # 21078)
13 WESTERN MINING ACTION PROJECT
14 P.O. Box 349; 440 Main St., #2
15 Lyons, Colorado 80540
303-823-5738
roger@wmaplaw.org

16 /s/ Allison N. Henderson

17 Allison N. Henderson (Pro Hac Vice Application To Be Filed)(Co Bar # 45088)
18 CENTER FOR BIOLOGICAL DIVERSITY
19 P.O. Box 3024
20 Crested Butte, CO 81224
970-309-2008
ahenderson@biologicaldiversity.org

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22 *Counsel for Plaintiffs*
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